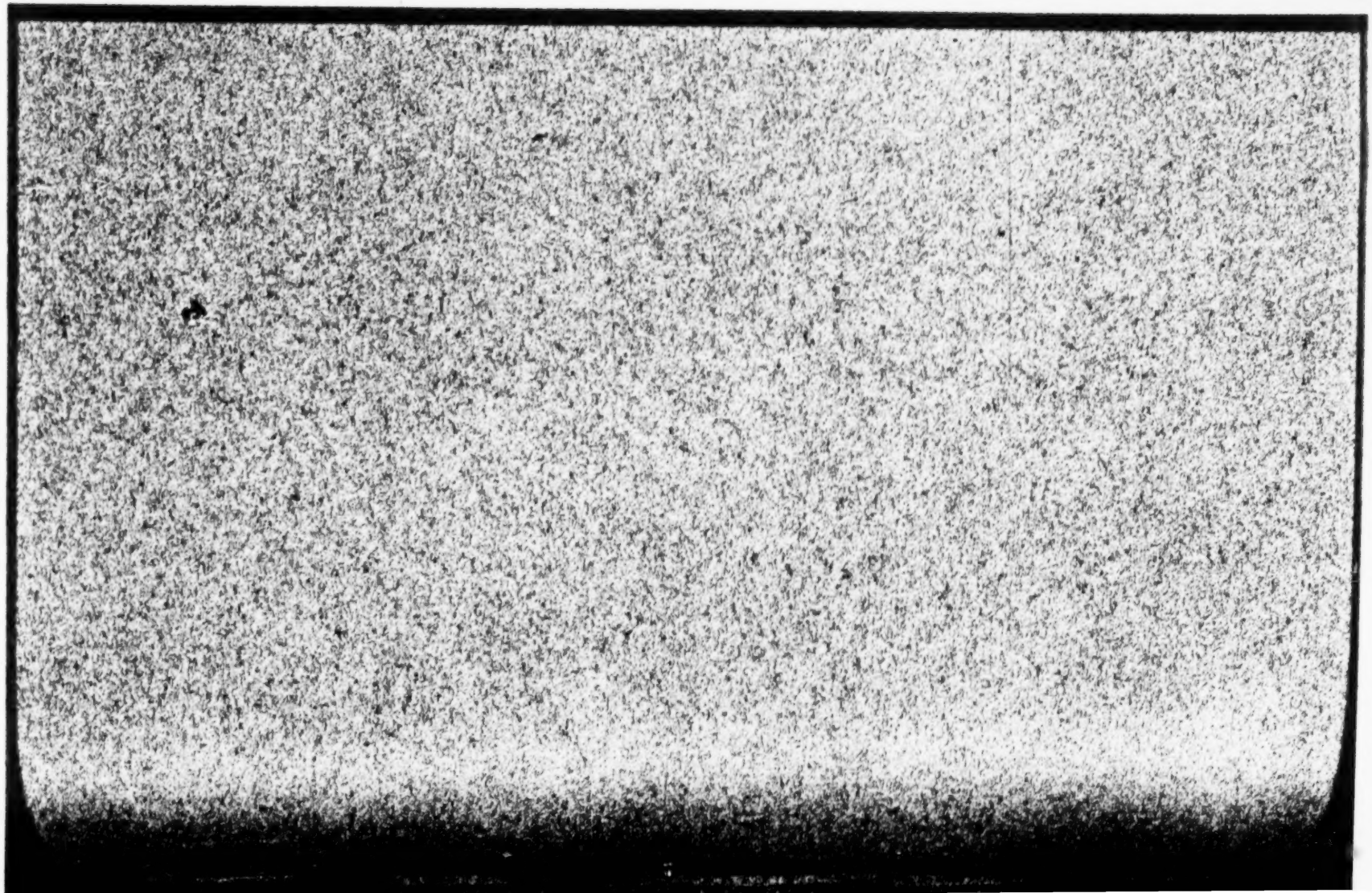

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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL PICTURES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 64) is reported in 34 F. (2d) 815.

JURISDICTION

The judgment of the District Court was entered December 23, 1929. (R. 72.) Petition for appeal was filed February 21, 1930 (R. 73), and was allowed on the same day (R. 75).

Jurisdiction of the Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32

Stat. 823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). *United States* v. *International Harvester Co.*, 274 U. S. 693.

QUESTION PRESENTED

Whether the adoption and use by appellees of certain credit committee rules constitutes a conspiracy in unlawful restraint of interstate commerce.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Secs. 1, 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> * * * * *
>
> SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain viola-

tions of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

This is a suit in equity under Section 4 of the Sherman Antitrust Act charging that appellees are engaged in a conspiracy in restraint of interstate commerce in motion picture films in violation of Section 1 of that Act. (R. 9.) Appellees (defendants below) are ten leading corporations engaged in the distribution of motion picture films for exhibition throughout the United States, thirty-two Film Boards of Trade (hereinafter sometimes referred to as "Film Boards") located in the thirty-two cities of the United States which are the chief centers of distribution of motion pictures and with a membership consisting of the local exchange man-

agers of distributors of motion pictures, the officers and members of such Film Boards, and the Motion Picture Producers and Distributors of America, Inc., a membership corporation, of which appellee distributors are members. (R. 1–8.) Appellees are the same as the appellants in *Paramount Famous Lasky Corporation* v. *United States,* No. 83 on the current docket of this Court.

The petition charged and the answer admitted that appellee distributors in January, 1926, caused each of the thirty-two Film Boards to adopt certain rules (hereinafter sometimes referred to as "credit committee rules") for the establishment and operations of a credit committee. (R. 21, 34.) The petition further charged that appellees have, through the medium of the credit committees thus established, taken joint action to force upon purchasers and lessees of motion-picture theatres the uncompleted exhibition contracts of their predecessors. (R. 19–25.)

Films produced in the laboratories of the appellee distributors are shipped from these laboratories and distributed, through the medium of film exchanges maintained by the distributors in the cities where the Film Boards are located, to exhibitors in States other than the State of the producing laboratory. (R. 15–19.) The answer admitted and the court below found that appellees are engaged in interstate commerce. (R. 33, 65.) See *Binderup* v. *Pathe Exchange,* 263 U. S. 291.

Appellee distributors distribute approximately 60 per cent of the motion-picture films exhibited in the United States and the members of the various Film Boards distribute approximately 98 per cent of the films exhibited in the United States. It is therefore impossible for any motion-picture theatre to secure sufficient films for its regular operation without dealing with one or more members of the Film Board in the territory in which the theatre is located. (R. 11, 32.) In contrast with such control of distribution by appellees and the other distributors associated with them in the Film Boards, there are thousands of exhibitors who operate a total of between 22,000 and 25,000 motion-picture theatres scattered all over the United States. (R. 39, 280–281.)

It is the practice of each distributor to announce in the spring of the year a program of motion pictures for a distribution period of twelve months to commence the following fall. (R. 13, 33.) Upon the announcement of the annual programs of pictures, exhibitors contract for the number of pictures which they will require for an extended time in the future, generally for a period of one year. (R. 14, 33.) Since no distributor in the course of a year distributes sufficient feature pictures to supply the average exhibitor's program, the average exhibitor deals with from five to fifteen distributors and signs from twenty-five to fifty contracts annually. (R. 38.) An exhibitor who requires an individual motion picture for a date in the im-

mediate future for which no pictures included in his group contracts are available or who needs a picture to complete his program may contract for any film which is available for immediate exhibition. This is known in the trade as "spot booking." (R. 15, 46.) Contracts with exhibitors are solicited by the distributors' exchange managers and their salesmen, but they are in all cases subject to acceptance by the home office. (R. 11–12, 32.) A standard exhibition contract (R. 49) is in general use in the industry (R. 38).

The distribution of motion pictures is entirely on a cash basis since the agreed rental or license fee for exhibition must always be paid in advance of delivery of films. (R. 38, 50.) But if a theatre changes hands and the new owner does not assume his predecessor's contracts, the distributor may find difficulty in leasing to another exhibitor the films covered by such contracts due to the practice in the industry of contracting for films for a considerable period in advance. (R. 38–39.) Although the distributor has in such cases a valid claim against the former owner or operator, there may not be sufficient prospect of recovery to justify bringing suit. (R. 99.) And in some cases the new owner or lessee was a mere dummy for the former owner or lessee. (R. 106.) The court below said with reference to this situation (R. 65–66):

> It appears that prior to the adoption of the credit rules which are here under attack

the distributors suffered very substantial losses through the repudiation of their contracts by exhibitors scattered throughout the United States. In the smaller towns many of the exhibitors were irresponsible financially, and conditions arose very seriously affecting the industry through the transfer of threatres to new owners pending the performance of exhibition contracts. In such cases the new owner, refusing to assume the contracts of the former owner, was solicited by salesmen from various distributors to enter into new contracts, and the distributors whose contracts had been repudiated by the former theatre owner suffered serious damage, rarely recoverable. Nor could the films thus thrown back upon the exchanges be readily placed in other theatres, because their programs had been arranged long in advance, and even when this could be done the films had generally become stale and commanded very much lower rentals than when originally licensed. This situation was seriously aggravated by a common practice among exhibitors in the smaller towns to evade their contractual obligations by colourable transfers of title to their theatres.

To meet this situation the distributors formulated a plan of exerting collective pressure upon purchasers and lessees of motion-picture theatres to compel them to assume the uncompleted contracts of their predecessors for the exhibition of pictures in the transferred theatre. The means adopted for carrying this plan into effect were the credit com-

mittee rules and the credit committees set up thereunder by the Film Boards. The rules state that the purpose of establishing the credit committees is, "To correct abuses and unfair practices which now prevail in the motion-picture industry arising out of changes of ownership of theatres for the purpose of avoiding uncompleted contracts." It is the Government's contention that in the formulation and use of these rules appellees exercised a form of coercive restraint which far exceeded any legitimate attempt to remedy conditions in the industry.

The rules, which are attached to the petition as an exhibit (R. 26–29), provide:

The president of the Film Board shall appoint a credit committee of three members and the secretary of the Film Board shall be the secretary of the credit committee. (Rules I and II.) The entire membership of the committee therefore consists of representatives of the distributors.

Members of the Film Board are required to report promptly to the secretary of the credit committee all transfers of theatres of which they receive knowledge. The secretary thereupon lists the transfer on a "Credit information list" which is circulated among the Board members for their confidential information. Forthwith upon receipt of each such list the members shall report to the secretary all existing contracts for the exhibition of pictures at each theatre listed. (Rule III.)

The secretary of the committee, upon learning of any transfer, is to request the new owner to fill out

within five days from the date of the secretary's request a form of questionnaire. (Rule IV.) A copy of the questionnaire used by the credit committees is attached to the petition as an exhibit. (R. 29–31.) The questionnaire calls for a statement of the contracts for film service made by the previous owner, showing for each such contract the name of the distributor, the date of contract, and the number of pictures unplayed.[1] The questionnaire asks whether these contracts have been assumed; and if not, whether they will be assumed. Included in the questionnaire is an "Assumption of contracts" to be executed by the new owner if he states that he will assume the uncompleted contracts of his predecessor.

The questionnaire also requests certain details concerning the theatre acquired, such as seating capacity, admission prices, etc.; whether the theatre is owned or leased and, if leased, the expiration date of the lease; the date when the theatre was taken over; where and when any bill of sale was recorded; the name and location of each theatre previously conducted; bank and other references and a statement of assets and liabilities.

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[1] When a theatre goes on the credit information list the members of the Film Board notify the credit committee on what are called "member statements" of the number of outstanding contracts with the former owner, giving the number of pictures and total money value involved. (R. 107.) The information requested by the questionnaire as to uncompleted contracts is therefore obtained by the credit committee from the Board members themselves, but its incorporation in the questionnaire serves to make specific the obligations of the exhibitor in executing an "Assumption of contracts."

Rule V provides that the credit committee shall meet at least once a week to report on new owners and shall furnish members with a copy of their report.

Rule VI sets forth the regulations intended to govern the credit committee in passing upon new owners. This rule reads as follows:

> Upon the refusal or failure of the new owner of a theatre to furnish within the time above provided the information and references requested of such new owner the Credit Committee shall indicate such fact upon the Credit Information List opposite the name of such theatre by the words "Credit information refused" (for which words for brevity the following letters may be used: "C. I. R.").
>
> The credit committee also shall indicate on the Credit Information list every sale or transfer of a theatre which upon investigation the credit committee concludes upon information received and considered was made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for the exhibition of pictures at such theatre. Such conclusion shall be indicated opposite the name of the theatre by the words "Transferred or sold to avoid existing contracts" (for which words for brevity the following letters may be used: "F. T.").
>
> The credit committee shall also indicate on the credit information list in a column

headed "Cash security" opposite the name of each theatre listed (excepting, however, such theatres the new owners of which have agreed to assume and complete all existing contracts entered into by the prior owners, and of which agreement notice has been given to or received by the credit committee) the amount of cash security, not to exceed the sum of one thousand dollars ($1,000), which in the judgment of the credit committee is a reasonable sum, which members shall require to be deposited as security for the full and complete performance of each contract thereafter made and entered into for the exhibition of pictures at such theatre. The credit committee in determining the amount of such security shall consider the total of the rental of pictures likely to be contracted for and the frequency of the possession by the exhibitor of prints of such pictures.

Rule VII (amended), when read in conjunction with Rule VI, constitutes an agreement by distributors belonging to the Film Boards to demand whatever security, not in excess of $1,000, is fixed by the credit committees before entering into exhibition contracts (except "spot booking") with purchasers and lessees of transferred theatres who have not assumed the contracts of their predecessors. This rule reads as follows:

No member of this Film Board of Trade shall enter into a contract or contracts for the exhibition of pictures at any theatre

listed on the credit information list for a period of ten (10) days from the date of the first appearance of such theatre upon such list nor after such period of ten (10) days unless the new owner or lessee of such theatre shall have paid in cash to such member with whom such owner or lessee desires to contract for pictures the amount of security specified on the credit information list opposite the name of such theatre.

This rule shall not be deemed to prohibit members from "spot booking" pictures for exhibition at any such theatre during the said ten-day period or if the credit committee shall not have then reported upon the credit standing of the new owner or lessee of any such theatre to "spot book" pictures for exhibition until the credit committee shall have so reported.

If the credit committee removes the name of a theatre from the credit information list, distributors may then freely contract with the new owner of such theatre. (Rule VIII.)

Any member of a Film Board violating any of the credit committee rules may be suspended or expelled from membership in the Board. (Rule X.)

The rules place every transferred theatre on the credit information list. Except in the case of new owners who have agreed to assume all the existing contracts of their predecessors, the credit committee indicates opposite the name of "each theatre listed" the cash security which in the judgment of

the credit committee is a reasonable sum which members shall require on each new contract for the exhibition of pictures at such theatre. Since the Film Board members have almost a monopoly of the business of distribution and since a theatre can not operate regularly by "spot booking," which would be both very difficult and very expensive (R. 118), the new owner is entirely at the mercy of the credit committee. The actual situation which confronts a theatre carried on the credit list is indicated by the statement in a letter from one Film Board secretary to another, "If credit has never been established, I do not see how that theatre is operating." (R. 239.) The result is that distributors, by agreeing not to deal except on conditions jointly imposed, have the power to force new owners to assume contracts which they are under no legal liability to assume and which may not be adapted to their needs and requirements. Although in many cases the credit committees did not make full use of this power, the element of coercion was obviously always present.

At the trial the Government offered in evidence certain documentary evidence obtained from the files of twenty-one of the Film Boards. (R. 81–83.) After the secretaries of the Dallas, Atlanta, and Omaha Boards had testified as witnesses for appellees, counsel stipulated that the files of these Film Boards (Government Exhibits 4, 4–A, 8, 18, and 24) and the testimony of the secretaries of these Boards should be considered as typical of the

documentary and oral evidence which might have been introduced or given with reference to the other Film Boards and that the case would be submitted on that basis. (R. 134–135.) Appellees also introduced certain figures compiled from the reports of the Film Board secretaries to the New York office of the general attorney of the Boards. (R. 87–88, 137.) The weight to be given these figures is discussed later. (*Infra,* pp. 35–39.)

Under the credit committee rules an "F. T.," or fraudulent transfer, is one "made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for the exhibition of pictures" at a theatre sold or transferred. (R. 27.) Participation by the new owner in such purpose, or even knowledge on his part of such purpose, is not an element in this rating as defined by the rules. The new owner may not have known of all the contracts of the previous owner (R. 256); he may have been misled by the previous owner (R. 274). Since purpose by the prior owner to avoid contracts is sufficient basis for an "F. T." rating, credit committees might, without knowing any of the actual facts involved, make such a rating in almost all cases of transfer where contracts were not assumed. The standard exhibition contract used by the distributors permits exhibition only at a designated theatre (R. 38, 50); so that an owner or operator who transfers his theatre puts it out of his power to fulfill his outstanding contracts. The mere fact of transfer and non-assumption of

contracts by the new owner might be regarded by the credit committees as presumptive evidence of a purpose to avoid contracts.

The only credit information list in the record (Gov. Ex. 24, R. 277) is one employed by the Dallas committee. It uses the key letters "C. I. R.," "F. T.," "Pndg.," and "O. K.," and defines the letters "O. K." as "transfers where all contracts assumed or credit of new owner O. K. or *O. K. with security as recommended*" (italics ours). Although not a single theatre on this list is rated "F. T.," twenty-one theatres are listed as "Previously O. K., With Security Deposits Recommended," and in another case where no key letters are used, cash security of $1,000 is recommended. (R. 277–278.) Government Exhibit 8 and the testimony relating thereto show at least eighteen transfers where the Dallas credit committee recommended security (R. 187, 191, 193, 194, 196, 202, 206, 213, 217, 222, 225, 226, 227, 98–99, 104), but the secretary of the committee in explaining the cases covered by this exhibit described only two or three of them as fraudulent transfers (R. 93, 96–97, 98–99). Although the secretary of the committee testified that listing a theatre "O. K." with security deposit recommended was a practice established individually by the Dallas Board and not covered by the rules (R. 117), nevertheless the records of this Board were one of the three which were stipulated to be typical of the records of other Boards (R. 134).

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The credit committees were not an agency for the exchange of credit information, but, as the court below said (R. 69)—

> *the proof is clear that financial and moral responsibility were subordinate considerations, and the purpose in requiring deposits on new contracts with old theatres was to induce the new owner to assume and perform the old contracts.* (Italics ours.)

The evidence would seem to justify an even broader finding, namely, that the one and only purpose of the credit committee rules was to bring about an assumption of the contracts of the prior owner or operator. The credit information list sent to Board members gives no credit information. (Gov. Ex. 24, R. 277.) If one of the objects was to obtain credit information, there are important omissions. The credit committee rules do not apply to the owners of newly constructed theatres. If the new owner has agreed to assume and complete all existing contracts entered into by the prior owner, the theatre is taken off the credit list and no security is listed even though the new owner has a notoriously bad credit reputation and even though he has not furnished the information requested by the credit committee. (R. 27, 43, 128.) One of the Film Board secretaries in testifying concerning the questionnaire said (R. 107):

> There is also a provision for a financial statement, but very few purchasers make

this out. We are not very insistent about that.

The District Court, in holding that appellees were not engaged in a combination or conspiracy in unlawful restraint of interstate commerce, said (R. 71):

> The defendants' agreement to demand security was fully justified by their common interest in preserving the integrity of contractual obligations owing to them by others. Such restraints as may have resulted from what was done were incidental to this legitimate purpose, and therefore not unreasonable or unlawful.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In dismissing the petition for lack of equity.

(2) In not entering a decree in accordance with the prayer of the petition.

(3) In not holding that appellees have engaged in an unlawful conspiracy to coerce and require exhibitors of motion pictures in the United States acquiring a motion-picture theatre by purchase or transfer to assume and to perform the uncompleted contracts for the exhibition of motion pictures in such theatre existing at the time of such purchase or transfer between the former owner or operator of said theatre and any appellee distributor and any other principal of any member of an appellee Film Board of Trade.

(4) In not holding that appellees have engaged in an unlawful conspiracy to deprive exhibitors of motion pictures in the United States acquiring a motion-picture theatre by purchase or transfer of the right to have any court of competent jurisdiction determine whether such purchase or transfer has been fraudulent and for the purpose of avoiding contractual obligations.

(5) In not holding that appellees have engaged in a conspiracy in unlawful restraint of interstate commerce in motion-picture films by agreeing to adopt, use, and enforce the credit committee rules attached to the petition as Exhibit A.

SUMMARY OF ARGUMENT

The distributors of motion pictures, who together have a substantial monopoly of the business of distributing motion pictures, have agreed to coerce purchasers and lessees of motion-picture theatres to assume the outstanding exhibition contracts of the former owner or operator of the theatre. This coercion has been exercised by agreement or concerted action by the distributors through their representatives on the local Film Boards not to make exhibition contracts with the new owner of a transferred theatre unless he assumes his predecessor's exhibition contracts or deposits on each new contract whatever security, up to $1,000, is listed by the credit committee composed of three members of the local Film Board. Although the agreement

permits a new owner to obtain pictures by "spot booking" without assuming contracts or putting up security, regular operation of a theatre through "spot booking" is not practicable.

We submit that this case is governed by the numerous decisions of this Court condemning as an illegal restraint of trade any agreement not to deal, or even any concerted action by members of a trade having such a purpose and effect. This Court has also said that such an agreement is equally invalid where the restraint may be removed by complying with the conditions fixed by those imposing the restraint. And it is no justification of an illegal combination in restraint of trade that the primary object of the parties to the agreement is to protect themselves against trade conditions which they consider inimical.

This Court has held that exchange of information between members of a trade association which merely permits the individual members to conduct their business more closely in accord with conditions in the trade is not illegal provided there is no express or implied agreement to act in concert on the basis of such information. *Maple Flooring Association* v. *United States,* 268 U. S. 563; *Cement Manufacturers Association* v. *United States,* 268 U. S. 588. There is a clear intimation in these opinions that an agreement to act in concert upon the basis of the information exchanged constitutes

a combination in illegal restraint of trade. We submit that in this case the illegality of appellees' agreement is manifested by the fact that they did not even purport to furnish their members with information which would enable them individually to carry on their business more intelligently, but simply gave them the information necessary to enforce collectively the decisions of their local agencies.

The view of the court below was that the restraint imposed by appellees was justified by their common interest in preserving the integrity of contractual obligations. This, we submit, is a doctrine which would sweep aside all limitations upon collective action by trade groups. Such "common interest" of the individual distributors is to be found in the fact that each enters into similar contracts with exhibitors and desires to have those contracts fulfilled. But the making of similar contracts and an interest in enforcing one's own contracts are not conditions peculiar to the motion-picture industry. Even if members of an industry can under any circumstances combine to set up extra-legal machinery for enforcing contracts, certainly such a combination should not be sanctioned, where, as in this case, the monopolistic power of appellees was exerted to require third persons to assume contracts for which in most cases they were not morally or legally liable.

ARGUMENT

THE CONCERTED ACTION OF APPELLEES TO COERCE AND REQUIRE PURCHASERS AND LESSEES OF MOTION-PICTURE THEATRES TO ASSUME THE OUTSTANDING EXHIBITION CONTRACTS OF THEIR PREDECESSORS CONSTITUTES A CONSPIRACY IN UNLAWFUL RESTRAINT OF INTERSTATE COMMERCE

The substance of the offense charged is that the distributors of motion pictures, who together monopolize the supply, are engaged in collective action to coerce and require new owners of theatres to assume the outstanding film contracts of their predecessors. To attain this purpose rules have been adopted which permit local agencies of the distributors, functioning as credit committees, to fix the amount of security, up to $1,000 on each contract, which new owners who have not assumed the contracts of their predecessors must deposit on each new contract (except "spot booking") until their status has been approved by the credit committees.

An agreement not to deal or even any concerted action having a necessary tendency to effect a boycott is a violation of the Sherman Act. In *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, a list of wholesalers who dealt directly with consumers was circulated among the members of associations of retailers. Names were placed on the list as the result of complaints by individual retailers that a wholesaler was selling to one of the retailer's customers. If a wholesaler gave satisfactory assurance that he was no longer selling in com-

petition with retailers, his name would be removed from the list. There was no agreement among the retailers not to deal with listed wholesalers, but the Court found that circulation of the list was intended to have the natural effect of causing retailers not to trade with concerns listed, and it held that circulation of the lists was a violation of the Sherman Act. The Court classed as an undue and unreasonable restraint of trade a practice which tended to deprive a wholesaler of the trade of retailers, not because of their personal grievances against him but because of the grievance of a member of one of the associations (pp. 612–613). The Court also said (p. 613) that practices which unduly restrain trade could not be justified on the ground that they were necessary to the protection of the retail trade and promotive of the public welfare.

In *Anderson* v. *Shipowners Association,* 272 U. S. 359, this Court held that an agreement among owners and operators of ships on the Pacific Coast to regulate the employment of seamen by establishing offices where each seaman was compelled to register, to await his turn in order to receive employment, and to take whatever employment was offered violated the Sherman Act. The restraint being unlawful, it was no justification that the object of the combination was merely to regulate the employment of men and not to restrain commerce. The Court said (p. 363):

> A restraint of interstate commerce can not be justified by the fact that the object of the

> participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint.

A restraint effected by an agreement not to deal is none the less objectionable because the restraint may be removed by complying with conditions fixed by those imposing the restraint. In *Eastern States Lumber Ass'n* v. *United States, supra,* for example, a wholesaler who abandoned the practice of which the retailers complained was no longer subject to restraint, but this did not render the restraint any the less illegal. In *Montague & Co.* v. *Lowry,* 193 U. S. 38, certain manufacturers of and dealers in tile formed an association with rules which prevented any nonmember dealer from obtaining tiles except at greatly enhanced prices. This Court said (p. 47) that the contention that the party injured by the agreement could, by joining the association, relieve himself of the restraint imposed was no defense to an action for damages under the Sherman Act.

In *Loewe* v. *Lawlor,* 208 U. S. 274, 294, the Court definitely condemned as unlawful any combination which "falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." In *Binderup* v. *Pathe Exchange,* 263 U. S. 291, *supra,* an exhibitor of motion pictures brought an action for damages under Section 7 of the Sherman

Act. The complaint charged that the exhibitor procured his films from some of the members of the Omaha Film Board of Trade, but had refused to buy from others; that the latter had caused false charges to be made against the exhibitor before the Film Board of Trade and, without his knowledge or an opportunity to be heard, placed him upon its black list, as a result of which distributors refused to deal with him; that the distributors thus refusing to deal controlled the distribution of all films in the United States. In holding that the complaint stated a valid cause of action, this Court said (p. 312):

> It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. 7

The present case seems to be squarely within the principle of these decisions that an agreement not to deal, or an agreement to deal only on conditions fixed by members of the combination, is illegal. In this case the monopolistic power of appellees creates an added element of restraint which was not present in most of the decisions condemning boycotting practices.

A new owner who does not assume the contracts of his predecessor is faced with this situation: He may "spot book," but he can not regularly operate in this way (*supra*, p. 13). His other alternative is to put up with each new contract the amount of cash security required by the credit committee. Even the $50 which is referred to as the minimum deposit adopted by the Dallas committee (R. 217, 222, 226) would probably be an insurmountable burden to the average small exhibitor who enters into twenty-five to fifty exhibition contracts yearly (R. 38).

The credit committees represented only the distributors and obviously acted with their interests in mind. They and not the exhibitor made the decision. Wherever, as was frequently the case, they made concessions to exhibitors, it is to be assumed that they made those concessions in the interest of the distributors. Thus, by making concessions which would permit a new owner to operate, the distributors could sell more pictures than if the theatre were closed. On the other hand, a spirit of concession was not always shown. For example, a credit committee required a deposit for a period of ten months until the purchaser finally assumed all the contracts of his predecessor, although the latter had overbought and had mixed up play dates, in one case three pictures and in another case two pictures being booked for the same dates. (R. 195–197.)

The vice of the situation lies in the fact that there are no real limitations upon the power of the credit committees, backed as they are by the united power of the distributors. The rules themselves give them almost unlimited discretion and no procedure for appeal from their decisions is provided. In addition, they sometimes went beyond even the rules. Although the rules permit "spot booking," in one case of a dispute with a credit committee an exhibitor wrote (R. 144):

> They promised us they would spot book us till we got a clearence, and now they have all cut us out without a minuite's notice.

The rules permit "spot booking" without security. (R. 28.) In a long-drawn-out dispute (Gov. Ex. 4–A, R. 149–181) between the purchaser of two theatres in Atlanta, Georgia, and the credit committee of the Atlanta Film Board, where a $500 deposit on each theatre was listed, several distributors who were "spot booking" these theatres demanded a $500 deposit on their contracts (R. 174–176, 180). The purchaser in this case went to New York and took up his difficulties with the general counsel of the Film Boards and the security demands were later withdrawn. (R. 169, 174–178.) The rules do not authorize their use to enforce arbitration awards, but when a corporation owning two theatres changed managers and the new manager advised that the corporation still existed and owned the theatres (R. 121–122), they were

listed for $1,000 cash security on the credit information list with the following notation (R. 278):

> Re Palace, Rialto, San Antonio, Epstein advises Alamo Amus. Co. still exists & owns these theatres; however, Epstein signs as gen'l mgr. of Alamo Am. Co. Epstein, Aztec, and Commerce Realty in default of arbitration award. The credit committee, under these circumstances, recommends a $1,000 deposit on any new applications for service in either Palace, Rialto, or Aztec * * *.

Appellees may contend that to make contracts for the future delivery of films is a form of extending credit. Such a contention seems irrelevant, since the operations of the credit committees were for a purpose entirely divorced from the question of credit standing. (*Supra,* pp. 16–17.) But apart from this we submit that the members of a trade association can not, by means of what is in effect an agreement not to deal except on burdensome conditions jointly agreed upon, force third parties to assume contracts which they do not desire. In trade association cases the line of demarcation between illegality and legality, as clearly indicated by the decisions of this Court, is whether there is an actual or implied agreement for concerted action or whether there is complete freedom of individual action.

In *Maple Flooring Association* v. *United States,* 268 U. S. 563, 585–586, *supra,* this Court held that

trade associations which openly and fairly gather and exchange information on costs, volume of production, prices in past transactions, stocks on hand, etc., "without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition" do not thereby engage in unlawful restraint of interstate commerce. And it was careful to point out that if such information becomes the basis of agreement or concerted action to limit production or to raise prices, "Such concerted action constitutes a restraint of commerce and is illegal and may be enjoined."

Cement Manufacturers Association v. *United States,* 268 U. S. 588, *supra,* held that members of a trade association could report overdue accounts and could also report whether cement which members had contracted to deliver under specific job contracts was actually being used for the job described in the contract. Exchange of the former type of information was upheld because there was no evidence that the members agreed to collective action based on the information. Exchange of the latter type of information was upheld because it was not used to fix prices, but simply to enable each member to protect himself against fraudulent orders by purchasers. With reference to credit information the Court said (pp. 599–600):

> The Government neither charged nor proved that there was any agreement with respect

> to the use of this information, or with respect to the persons to whom or conditions under which credit should be extended. The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer.

With reference to information relating to specific job contracts the Court said (pp. 603–604):

> * * * in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, *which information they are free to act upon or not as they choose,* can not be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound. (Italics ours.)

In the court below appellees contended that Defendants' Exhibit A (R. 278) shows that only a small percentage of total transfers were given an "F. T." rating. We submit that even if appellees did not in all cases enforce their rules, this is no

defense to an illegal restraint of trade. In addition, the only credit information list in the record is that of the Dallas committee. The secretary of that committee testified that it listed security for cases which came within the definition of fraudulent transfers laid down in the rules, but did not designate these cases "F. T." (R. 115.) Purchasers were thereby subjected to substantially the same pressure as when they were rated "F. T." The secretary of this committee testified that the listing of security in any case which was not a fraudulent transfer was merely a recommendation of security which the distributors were, according to the rules, free to demand or not to demand. (R. 114.) But on further examination he admitted that in practice the Film Board members did not enter into new contracts with owners appearing on the credit information list and that, if they did, they always asserted it was a mistake and would probably be censured at a meeting of the Film Board. (R. 114.)

The secretary's interpretation of the credit committee rules seems inconsistent with Rule VII (amended), which provides (R. 28):

> No member * * * shall enter into a contract or contracts for the exhibition of pictures at any theatre listed on the credit information list * * * unless the new owner or lessee of such theatre shall pay in cash to such member * * * the amount of security specified on the credit information list opposite the name of such theatre.

In a letter from one Film Board secretary to another asking for an explanation of a contract made by a distributor for the exhibition of pictures at a theatre carried on the credit list with security, no mention was made of any "F. T." rating. (R. 234.) The answer to this letter advises that "the credit committee had them cancel same immediately." (R. 234–235.)

Even if there was no binding agreement among distributors to demand the security listed by credit committees in cases not rated as "F. T." or "C. I. R.," the intended effect was to bring about a common demand for such security. Under the decisions of this Court in *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, *supra,* and *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, this would appear to constitute an illegal restraint of the same character as a similar restraint accomplished by direct agreement.

The Government has conceded for the purposes of this case that the distributors were in active competition with each other. (R. 84.) But the offense charged is not suppression of competition between distributors; the charge is that the interstate commerce of exhibitors was unlawfully restrained. The District Court in *United States* v. *Paramount Famous Lasky Corporation,* 34 F. (2d) 984, 988 (the appeal being No. 83 on the current

docket of this Court), convincingly answered a similar contention made in that case as follows:

> In judging the inherent character of the restraint one must look not only to the restraint voluntarily imposed upon the competitive activities of those who are in the combination, but also to the involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions. It is therefore not enough to say that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights, has been unduly restrained by the coercive and collective action of the defendants.

Chicago Board of Trade v. *United States,* 246 U. S. 231, held that the "Call" rule of the Chicago Board of Trade which prohibited members of the Board from purchasing or offering to purchase, during the period between the session of the Board termed the "Call" and the opening of the regular session of the next business day, grain "to arrive" at a price other than the closing bid at the "Call," does not violate the Sherman Act. The rule applied only to agreements to deliver on arrival grain which was already in transit to Chicago or was to be shipped there within a time specified and it therefore covered only a small part of the grain shipped

to Chicago and an even smaller part of the day's sales. It did not apply to grain already in Chicago or grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." It applied only to a part of the business day. The Court also found that within the narrow limits of its operation the rule helped to improve market conditions by creating a public market for grain "to arrive," by bringing into the regular market hours of the Board sessions more of the trade in such grain, by bringing buyers and sellers into more direct relations, by distributing the business among a larger number of Chicago commission merchants, by supplying country dealers with more regular bids from Chicago, by eliminating risks necessarily incident to a private market, and in other ways.

The mere statement of these facts would seem to distinguish the foregoing case from the instant one. The rules here complained of were enforced by those doing 98 per cent of the business of distributing motion pictures; and the rules, instead of merely limiting the price at which bids would be made during a small part of the business day in only one market and with respect to only a small part of the commodity affected, and otherwise stimulating competitive conditions, made it possible to cut off from exhibitors their entire supply of films, and for an unlimited period, unless they met the conditions imposed by the distributors.

In *United States* v. *Fur Dressers' and Dyers' Association,* 5 F. (2d) 869, a District Court held that an agreement by members of a trade association (comprising about one-fifth of those engaged in the business and doing less than seventy per cent of the total business) that they would not make delivery except for cash to customers indebted to members of the association on undisputed accounts in amounts of $100 or more was not an unlawful restraint of trade. We submit that this case, if sound law, is not applicable here. The rules there in question applied against delinquent debtors, whereas here the rules are applied against those not in any default on their contractual obligations. The rules there in question also did not have the same coercive effect as the credit committee rules, because the delinquent debtors could still trade freely on a cash basis or with nonmembers of the association, whereas here cash security may be made an intolerable burden, "spot booking" is impracticable, and there are in effect no nonmembers. Of course, new owners can continue to operate on the contracts of the former owner, but in that event the very restraint intended by the rules is accomplished.

Appellees' answer alleges that distributors suffered losses when theatres were transferred and outstanding contracts were not assumed (R. 38–39), but we submit that this fact gave them no license to violate the antitrust laws by imposing an

unreasonable restraint on the trade and commerce of others.

It seems fair to conclude that one important effect of the credit committee rules has been to transfer certain losses from the highly organized distributor group to the largely unorganized exhibitors. If an owner has contracted for too many films (R. 195), or agreed to too high rentals (R. 143), or used poor judgment in the selection of pictures, his failure and consequent repudiation of contracts are likely to follow. In such event the credit rules may be used to impose on the new owner the unsuccessful policy of his predecessor, thus shifting the risk of loss from the distributors to the new exhibitor, although the loss is properly that of the distributors who made the contracts and who have been receiving the profits incidental thereto. It is a proper inference that in the great majority of cases where contracts are not assumed it is because they are unsatisfactory, since the assumption of satisfactory contracts does not put a new owner at any disadvantage.

In the court below appellees contended that the figures in Defendants' Exhibit A (R. 278) showing the number of purchasers in 1927 and 1928 who refused to assume any part of the uncompleted contracts of previous exhibitors and the amount of rentals involved in such contracts indicate that the credit rules were not drastically enforced. But we submit that these figures, being based on the first

reports of the credit committees, are unreliable as a true picture of the situation.

The reason why the first reports of the credit committees can not be accepted as showing how the collective pressure exerted by these committees was used to coerce purchasers into assuming contracts they did not desire is that the pressure of the credit committee rules is ordinarily applied *after* the credit committee has made its first report listing a theatre on the credit information list. This is graphically illustrated by the fact that of the 175 "F. T." ratings for 1928 shown in the first reports only 30, or less than eighteen per cent, remained at the end of the year, and of 974 "C. I. R." ratings for 1928 shown in the first reports only 183, or less than nineteen per cent, remained at the end of the year. (R. 279.)

Defendants' Exhibit A was prepared by an assistant of the general attorney of the Film Boards from reports received in his office from the Film Boards. (R. 87.) The exhibit does not specifically state whether the figures on the number of purchasers not assuming any contracts and on the amount of rentals involved in such contracts are based on the first or the final reports of the credit committees, and appellees' counsel on direct examination of the witness who prepared this exhibit did not ask any question to elicit this information. (R. 87–88.) Notations to the figures on this exhibit give the favorable credit ratings and the "C. I. R."

and "F. T." ratings for the year 1928 based on the first and the final reports of the credit committees and also show that no figures were available for 1927 based on both the final reports of the credit committees. The witness testified that the figures on "F. T." ratings in Defendants' Exhibit D (R. 280) were based on the first reports of the credit committees for the year 1927 and on final reports for the year 1928 (R. 137), and on cross-examination said (R. 138):

> We had no information as to the ultimate figures. We did not call for it that way.

The witness, on cross-examination as to the basis for the 1928 figures on purchasers who did not assume contracts, gave conflicting answers to questions as to whether the first report or the ultimate report was the basis for these figures. (R. 88.)

As appellees failed to establish that the figures on the number of purchasers who did not assume contracts and on the amount of rentals involved in such contracts were based on final reports of the credit committees, and as there was a clear implication from Exhibit A and the testimony that 1927 figures based on final reports were not available, we submit that these figures must be taken as representing the first reports of the credit committees. If the ratio of change between the first reports and the final reports with reference to the 1928 "C. I. R." and "F. T." ratings is applied, the number of purchasers who refused to assume contracts

was, for the years 1927 and 1928 combined, less than seven per cent of total transfers in those years, and the amount of rental involved in such cases was, for these two years combined, less than eight per cent of the aggregate rental involved in uncompleted contracts of theatres transferred during these years. This would indicate that the credit committees achieved a large measure of success in compelling assumption of contracts.

We also submit that the figures on favorable credit ratings in Exhibit A also do not give a true picture of the situation. The only unfavorable credit ratings which the witness recognized were those marked either "C. I. R." or "F. T." (R. 89), but cash security might be listed without either of such ratings (R. 277–278). The actual pressure applied was by the listing of cash security and the evidence does not disclose in how many cases cash security was required.

The figures in Exhibit A showing the amount of rentals involved in uncompleted contracts when theatres were transferred give no indication whatever of the losses which distributors would suffer if the pressure of the credit committee rules were not applied. In the first place, quite apart from the rules, purchasers in many cases would *voluntarily* assume these contracts; in fact, the self-interest of the former owner in relieving himself of default on his contracts would lead him to make assumption of the contracts a condition to the

transfer of the theatre unless the purchaser regarded the contracts as definitely unfavorable. In the second place, even where contracts were not assumed the distributors involved could place their films in other theatres and the figures are therefore not an index to the distributors' losses on whatever part of the uncompleted contracts would not be voluntarily assumed by purchasers. In the third place, taking the distributor group as a whole, the effect of nonassumption of contracts is largely a shifting of business among the distributors without any substantial decrease in total rentals received since the rentals paid by new owners on new contracts would approximate the rentals on the contracts not assumed. Finally, some loss from failure to fulfill contracts is an element of every business, but the motion-picture industry, being on a cash basis for delivered films, has less credit risk than the ordinary business, and in any event whatever net credit losses distributors suffered by reason of nonassumption of contracts would be significant only in comparison with the total business done, and appellees introduced no figures showing their total business.

If appellees had really been interested solely in obtaining information concerning the new owners of theatres they might merely have circulated among their members whatever information the Board secretaries might obtain as to the moral and

financial standing of new owners and as to possible collusive arrangements between them and their respective predecessors. But no such information was given to the distributors; the only relevant information given was the cash security which would be required upon entering into new contracts, which cash security the distributors had agreed with each other to exact, not of those who were in default on their contracts but of those who conveniently could be forced to assume the contractual obligations of others.

We submit that the implications of the holding of the lower court that the restraint imposed by appellees "was fully justified by their common interest in preserving the integrity of contractual relations owing to them by others" (R. 71) carry too far. In any industrial grouping it is to the interest of each member to have his customers fulfill their contracts. But this Court has never sanctioned an agreement among the members of an industry to act in unison in making an agency of the group an extra-legal tribunal to compel fulfillment of contractual obligations. Such a restraint on competition seems particularly obnoxious to the antitrust laws where the enforcing group, as in this case, has monopolistic control of the industry. The alleged justification would seem to become even more untenable where, as in this case, the pressure of the group is applied to those who in most cases are not under any legal liability to the members of the industry.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be reversed with directions to enter a decree in accordance with the prayer of the petition.

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